

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

In re:
BKY 4-90-869

KEITH T. HARSTAD and
DIANE N. HARSTAD,
d/b/a Harstad Companies,

Debtors.

KEITH T. HARSTAD
CIV 3-93-512
and DIANE N. HARSTAD,
(ADV 4-93-048)
d/b/a Harstad Companies,

Plaintiffs,

v.

ORDER

FIRST AMERICAN BANK,
f/k/a/ Drovers First American
Bank of South St. Paul,

Defendant.

This matter comes before the Court on Plaintiffs' appeal from the June 30, 1993 order of Chief United States Bankruptcy Judge Robert J. Kressel. Harstad v. First Am. Bank (In re Harstad), 155 B.R. 500 (Bankr. D. Minn. 1993). The bankruptcy court granted Defendant's motion for summary judgment and dismissed Plaintiffs' complaint. Plaintiffs challenge the bankruptcy court's conclusion that they did not have standing to commence a post-confirmation action because they failed to specifically provide for the retention of preference actions as required by 11 U.S.C. Section 1123(b)(3)(B).(FN1) In addition, Plaintiffs argue that the bankruptcy

court incorrectly concluded that they could not maintain a preference action because any recovery would not benefit their creditors as required by 11 U.S.C. Section 550(a).

The standard of review on appeal from the bankruptcy court's grant of summary judgment is de novo. United States ex rel. Glass v. Medtronic, Inc., 957 F.2d 605, 607 (8th Cir. 1992); United States v. Tharp, 973 F.2d 619, 620 (8th Cir. 1992). Summary judgment is appropriate if the record, "when viewed in the light most favorable to the non-moving party, shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Medtronic, 957 F.2d at 607.

I. Whether Plaintiffs have Standing to bring a Post-Confirmation Preference Action

As the bankruptcy court held, Section 1123(b)(3)(B) applies
to

determine whether plaintiffs are entitled to bring a post-confirmation preference action. The Court recognizes that some courts outside this jurisdiction have reached a contrary result regarding the applicability of Section 1123(b)(3)(B) where the issue is the debtor's reservation of a post-confirmation preference action. See, e.g., *J.E. Jennings, Inc. v. William Carter Co.* (In re *J.E. Jennings, Inc.*), 46 B.R. 167, 170 (Bankr. E.D. Pa. 1985) (analyzing this issue under 11 U.S.C. Section 1141(b), which is the provision Plaintiffs urge the Court to apply). While Plaintiffs set forth a well-articulated challenge to the bankruptcy court's conclusion that Section 1123(b)(3)(B) applies in this case, the Court nonetheless affirms the bankruptcy court's approach for the reasons set forth in the bankruptcy court's order. The Court also finds that the bankruptcy court correctly determined that Section 1123(b)(3)(B) requires specific and unequivocal language of retention and that such language was not used in Plaintiffs' confirmed plan.

II. Whether a Post-Confirmation Recovery would Benefit the Estate

As the bankruptcy court held, even if Plaintiffs had standing to bring a post-confirmation preference action, they would not have the right to recover. 11 U.S.C. Section 550(a) provides that any post-confirmation recovery must benefit the estate. The bankruptcy court held that post-confirmation recovery benefits the estate pursuant to Section 550(a) only if "[c]reditors [are] meaningfully and measurably benefitted." (FN2) In re *Harstad*, 155 B.R. at 512.

(FN3) As Defendant concedes in its brief, several cases outside this jurisdiction have held that a debtor need only show that a e.g., *Greenbelt Coop., Inc. v. Werres Corp.* (In re *Greenbelt Inc.*), 124 B.R. 465, 473 (Bankr. D. Md. 1991). Upon careful review of the record, including the bankruptcy court's order and the parties' briefs, the Court finds that the approach adopted by the bankruptcy court is preferable to the less stringent test advocated by Plaintiffs. Moreover, the Court affirms the bankruptcy court's conclusion that Plaintiffs' creditors in the instant case would not be meaningfully and measurably benefitted by a post-confirmation preference action.

Accordingly, based upon a de novo review of all the files, records, and proceedings herein,

IT IS ORDERED That the bankruptcy court's June 30, 1993 order is AFFIRMED.

DATE: January 20, 1993.

DONALD D. ALSOP, Senior Judge
United States District Court

(FN1) Plaintiffs also question whether Section 1123(b)(3)(B) is applicable in this case, arguing that the bankruptcy court should have instead applied 1141(b).

that (FN2)
Plaintiffs argue that "there is no requirement [in Section 550]
unsecured creditors actually benefit from recovery." (Plaintiffs'
Reply Brief at 12.) The Court rejects this argument. As the
bankruptcy court noted, "Congress carefully articulated its desire
in 550, making sure it was the estate, i.e. creditors, and not the
debtor who benefits from any preference recovery." In re Harstad,
155 B.R. at 511.

(FN3)Some courts have adopted an even narrower definition of
"benefit to the estate." See, e.g., Northwest Nat'l Bank v. Retail
Mkt. Co., (In re Mako, Inc.), 120 B.R. 203, 211 (Bankr. E.D. Okl.
1990), aff'd, 985 F.2d 1052 (10th Cir. 1993) ("[F]or a party to
be a true representative of the estate, any and all proceeds
realized from the prosecution of the avoidance actions must be paid
to the creditors of the estate, whether they be administrative or
unsecured."(emphasis added)).